

NTSB Order No. EA-4457

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of May, 1996

Respondent .

Docket SE-14172

Both respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, issued on December 4, 1995, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 135.227(a) and

6684

91.13(a).² The law judge waived the Administrator's proposed 45-day suspension, on finding that respondent qualified for waiver of sanction pursuant to the Aviation Safety Reporting Program (ASRP). We deny both appeals.

Respondent was the pilot-in-command of a Cessna 208 being operated in passenger-carrying service between Juneau and Gustavus, AK. According to the testimony of two FAA inspectors, respondent departed with ice (including icicles) on the elevator control system. Respondent denied the existence of ice on the aircraft, and introduced testimony from a member of the ground crew (John Edwards) that he saw no ice or icicle accumulation and that respondent had conducted a thorough inspection of the exterior of the aircraft. Tr. at 147-150.

The law judge observed that the conflicting testimony could not be reconciled. He ultimately concluded that, while respondent did inspect the upper surface of the elevators and believed there was no ice accumulation, either he and Mr. Edwards missed seeing it or the ice formed as a result of an ice pellet shower that occurred after their initial preflight inspection and very shortly before takeoff. Tr. at 252-253.

We address the Administrator's appeal of the law judge's

²Section 135.227(a) provides:

- (a) No pilot may take off an aircraft that has -
- (1) Frost, snow, or ice adhering to any rotor blade, propeller, windshield, or powerplant installation, or to an airspeed, altimeter, rate of climb, or flight attitude instrument system;
 - (2) Snow or ice adhering to the wings or stabilizing or control surfaces; or
 - (3) Any frost adhering to the wings, or stabilizing or control surfaces, unless that frost has been polished to make it smooth.

application of the ASRP waiver first.³ Under the ASRP, waiver of sanction requires a substantive finding that the violation was inadvertent and "not deliberate." The law judge, with reference to Ferguson v. NTSB, 678 F.2d 821 (9th Cir. 1982), stated that an inadvertent act is not the result of a purposeful choice and that respondent's "action is more akin to misreading an instrument than choosing not to consult his instrument, or in this case, by not making any inspection at all." Tr. at 255-256.⁴ The Administrator claims that respondent's conduct does not meet the test of inadvertence, and that the law judge misconstrued that test.

At some level of analysis, every act can be considered purposeful in that a choice is made, even a choice whether to be more careful or less careful. The Administrator's argument here

³We deny the Administrator's motion to strike respondent's reply brief. Administrator v. Hooper, 6 NTSB 559 (1988), does not govern whether to accept or reject reply briefs, as it applies only to appeal briefs and notices of appeal. See Application of George O. Grant, NTSB Order EA-3919 (1993). The standard for review here is whether accepting the reply would prejudice the Administrator. Id. The Administrator does not establish any such prejudice and we can see none. And, as to respondent's "objection" to the Administrator's motion, we will consider it a reply.

⁴The Ferguson court stated:

...an inadvertent act is one that is not the result of a purposeful choice. Thus, a person who turns suddenly and spills a cup of coffee has acted inadvertently. On the other hand, a person who places a coffee cup precariously on the edge of a table has engaged in purposeful behavior. Even though the person may not deliberately intend the coffee to spill, the conduct is not inadvertent because it involves a purposeful choice between two acts - placing the cup on the edge of the table or balancing it so that it will not spill.

(...continued)

that respondent, in effect, was purposeful in a choice not to look as carefully for ice as was necessary does not reflect the distinction intended for ASRP purposes. In Administrator v. Fay, 7 NTSB 951 (1991), we discussed Ferguson,⁵ and found that the intent of the ASRP is to exclude sanction waiver for conduct that approaches deliberate or intentional conduct in the sense of reflecting a "wanton disregard of the safety of others" or a "gross disregard for safety." Fay at 956.

In this case, the law judge identified the standard by which respondent was to be judged and concluded that ASRP sanction waiver should be permitted. At least part of that conclusion is based on the law judge's first-hand impressions of respondent at trial, including the law judge's findings of fact that respondent performed an inspection of the aircraft, including climbing up on a ladder to inspect the upper wing and tail surfaces, and that respondent believed the aircraft was free of ice. Tr. at 251-2. We can find no error in a conclusion that respondent's behavior did not reflect a gross disregard for safety or a wanton disregard of the safety of others.

Respondent's pro se brief primarily raises issues regarding the sufficiency of the evidence and credibility of the Administrator's witnesses. As to the latter point, and although we understand respondent's concerns and disagreement with the testimony offered by the Administrator, we do not review on

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⁵The respondent in that case was, as far as we are aware, no relation to respondent here.

appeal the credibility decisions reached by the law judge after personal observation of the witnesses unless it is demonstrated that those decisions were arbitrary or capricious or inherently incredible. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there.⁶ Further, respondent's recitation of the facts as he sees them, admittedly presented in a light "most favorable" to respondent (Appeal at 2), fails to demonstrate reversible error in the law judge's findings of fact. For example, respondent argues that it would be a physical impossibility for ice to form only on the tail area and not elsewhere, yet the Board, in adjudicating these cases, must rely on record evidence, not on a respondent's argument and belief.⁷ The law judge concluded that, either the ice was there "when respondent and Mr. Edwards looked at the aircraft and they missed it, or it formed as the result of the ice pellet shower." Tr. at 253. Respondent has not shown that the record can not support this finding.

Finally, we would note, in response to respondent's concern regarding the carelessness charge, that this charge follows, as a

⁶Respondent questions the testimony of the FAA inspectors, in part, due to their failure to act on their observations and advise him not to take off. (It was their testimony that they believed deicing would be done prior to takeoff and after passenger loading, whereas respondent introduced evidence to show that deicing before passenger loading was the normal practice.) In crediting the inspectors' testimony, the law judge implicitly rejected respondent's suggestion that the inspectors lied about this belief to disguise their failure to warn.

⁷The Administrator's motion to strike exhibits is granted in part. Exhibits constituting new evidence are stricken. Contrary to the Administrator's argument, we see no difficulty with (...continued)

matter of law, from the operational violation. Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there (a violation of an operational FAR regulation is sufficient to support a finding of a "residual" or "derivative" carelessness violation).

ACCORDINGLY, IT IS ORDERED THAT:

1. Those exhibits constituting new evidence that are attached to respondent's appeal brief are stricken;
2. Respondent's appeal is denied; and
3. The Administrator's appeal is denied.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

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accepting copies of exhibits already in the record.